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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 3

UNITED STATES EX REL. RICHARD EICHENLAUB, PETITIONER

v.

EDWARD J. SHAUGHNESSY, AS ACTING DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION OF THE UNITED STATES FOR THE DISTRICT OF NEW YORK, OR SUCH PERSON, IF ANY, AS MAY HAVE THE SAID RICHARD EICHENLAUB IN CUSTODY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 12-14), affirming the order which dismissed the writ of habeas corpus, is reported at 167 F. 2d 659. The opinion of the District Court (R. 8-9) is not reported.

JURISDICTION

The petition for a writ of certiorari was filed on September 3, 1948. Certiorari was denied on

November 15, 1948, but the order was vacated and certiorari granted on June 27, 1949. (R. 17.) The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

The Act of May 10, 1920 provides that among the aliens subject to deportation if found to be undesirable residents are "all aliens who since August 1, 1914, had been or may hereafter be convicted" of certain specified offenses. The questions presented are:

1. Whether the crime of which petitioner was convicted is one of those enumerated in the statute.

2. Whether the statute applies to an alien, such as petitioner, who was a naturalized citizen when he was convicted but has since been denaturalized.

3. Whether the requisite administrative finding was made that petitioner is an "undesirable resident."

4. Whether the judgment of denaturalization may be attacked in this habeas corpus proceeding, and if so, whether the judgment entered with petitioner's consent was valid without proof of the allegations of fraud.

STATUTE INVOLVED

Section 1 of the Act of May 10, 1920, c. 174, 41 Stat. 593-594, 8 U. S. C. 157, provides:

> That aliens of the following classes, in addition to those for whose expulsion from the

United States provision is made in the existing law, shall, upon the warrant of the Secretary of Labor, be taken into his custody and deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States," if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit:

* * * * *

(2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely:

(a) An Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, or the amendment thereof approved May 16, 1918;

* * * * *

STATEMENT

Petitioner entered the United States from Germany in 1930 and became an American citizen by naturalization on December 17, 1936. He has resided in this country continuously since August 20, 1937, when he returned from a visit to Germany.

On September 3, 1941, he was convicted on his plea of guilty to the charge of having conspired to act as an agent for a foreign government without being registered with the Secretary of State, and was sentenced to imprisonment for 18 months and fined $1,000. (R. 7.)

On January 25, 1944, on petitioner's consent (Pet. 4), a judgment was entered in the United States District Court for the Southern District of New York cancelling his citizenship on the ground of fraud. Thereafter, deportation proceedings were instituted against petitioner pursuant to the Act of May 10, 1920, c. 174, 41 Stat. 593-594 (8 U. S. C. 157), and, after a hearing before an Immigration Inspector and review by the Board of Immigration Appeals, both of whom made findings of fact (R. 7) petitioner was ordered deported (R. 1-2). The warrant of deportation which was issued on October 9, 1945, recited that petitioner was deportable under "the Act approved May 10, 1920 in that he has been found to be a member of the undesirable classes of alien residents enumerated in said Act, to wit, an alien who since August 1, 1914 has been convicted of conspiracy (18 U. S. C. 88) to violate an Act entitled, 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917 (22 U. S. C. 233)" (R. 2).

A petition for a writ of habeas corpus was filed in the District Court for the Southern District of New York, in which petitioner alleged that the warrant of deportation was issued without authority of law; that the proceedings were unfair and the findings unsupported by evidence; and that the warrant of deportation was based on an erroneous construction of law (R. 3-5). Upon the return (R. 6-8) and an examination of the immigration file (see R. 8), the writ was dismissed (R. 9-10), and on appeal to the Court of Appeals for the Second Circuit, the order of dismissal was affirmed (R. 15).

SUMMARY OF ARGUMENT

A. It is clear that the charge to which petitioner pleaded guilty, namely, a conspiracy under 18 U. S. C. 88 to violate the provisions of 22 U. S. C. 233, by conspiring to act as an agent of a foreign government without prior notification to the Secretary of State, is one of the offenses enumerated in the Act of May 10, 1920, for conviction of which an alien may be deported if he is found to be an undesirable resident. The Act of June 15, 1917, defining the offense, has not been repealed; in fact, the penalty for its violation has been increased.

B. The Act of May 10, 1920, does not expressly exclude from its provisions aliens who, at the time of their conviction, were naturalized citizens. The presence in the statute of the phrase "may hereafter be convicted" does not indicate a legis-

lative intention that alienage and conviction must be contemporaneous but signifies merely that, in respect of the time of conviction, the statute shall operate prospectively as well as retrospectively. And no reason is apparent why Congress should have excepted from deportation an alien who not only committed one of the specified wartime offenses, but also fraudulently procured his naturalization. The crucial factor is the alien's *present* undesirability as a resident of this country. Under the express terms of the deportation statute, once petitioner was denaturalized, he was deportable because of the past conspiracy conviction regardless of his status at the time of the conviction.

If the statute should be construed to require that the alien must have been in that status at the time of his conviction, petitioner nevertheless is within its scope. The cancellation of his naturalization for fraud in its procurement operated to revoke his citizenship *ab initio*, thereby having the legal effect of rendering him an alien at all times.

C. Although the warrant of deportation can be read as not explicitly stating that petitioner has been found to be an undesirable resident, it is clear from the other matter in the administrative file that this finding was made by the immigration officials, and hence the statutory requirement has indeed been met.

D. Petitioner's attack on the judgment of denaturalization is a belated afterthought, which is

made for the first time in this Court. Since petitioner's direct attack on that judgment is now pending in the Court of Appeals for the Second Circuit, considerations of proper judicial administration should preclude its consideration here. It should, in any event, be disregarded as a collateral attack upon a judgment without any basis since no contention is made that the court which entered the judgment was without jurisdiction to act. Moreover, since the denaturalization judgment was entered with petitioner's consent, it was not incumbent on the Government to produce evidence of the petitioner's fraud in procuring the certificate of naturalization.

ARGUMENT

The Act of May 10, 1920 (*supra*, pp. 2-3), provides that aliens convicted of violations of specified wartime legislation shall be deported if they are found by the Secretary of Labor [1] to be undesirable residents. The Attorney General has determined that petitioner was convicted in 1941 of one of the specified crimes and that he is an "undesirable resident," and, therefore, has ordered him deported. Petitioner contends (1) that the crime of which he was convicted is not one of those specified in the 1920 deportation statute; (2) that at the time of his conviction he was a naturalized citizen and,

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[1] Now the Attorney General, to whose direction and supervision the functions of the Immigration and Naturalization Service were transferred. 1940 Reorganization Plan No. V, 54 Stat. 1238, effective June 14, 1940.

therefore, not within the purview of the deportation statute; (3) that the warrant of deportation is inadequate; and (4) that because of defects in the denaturalizing proceeding, he is not an alien at all, and, therefore, not subject to deportation. We submit that none of these contentions has merit.

I

Petitioner Is Within the Class of Alien Criminals Who Are Deportable as Undesirable Residents

A. *Petitioner was convicted of a crime specified in the Act of May 10, 1920.*—Among the crimes upon conviction of which an alien may be deported under the Act of May 10, 1920 (*supra*, pp. 2-3), if he is found to be an undesirable resident, is a "conspiracy to violate * * * an Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917, or the amendment thereof approved May 16, 1918."

Section 3 of Title VIII, of the Act of June 15, 1917 (40 Stat. 226), reads as follows:

> Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Section 6 of the Act of March 28, 1940, 54 Stat. 80, entitled "An Act to amend the Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917, as amended, to increase the penalties for peacetime violations of such Act," provided:

> Sections 1, 2, and 3 of title VIII of such Act, are amended by striking out of each of such sections "shall be fined not more than $5,000 or imprisonment not more than five years, or both", and inserting in lieu of the matter stricken out the following: "shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $5,000."

Prior to 1940, Section 3 of Title VIII of the 1917 Act was codified as Section 233 of United States Code, Title 22. It was renumbered Section 601 [2] in the 1940 edition of the Code without any change in substance except the incorporation of the increased penalty prescribed by the 1940 amendment. See 22 U. S. C. [1940 ed.] p. 1909. It is clear, therefore, that in 1941, when petitioner was convicted, the substantive crime described in 22 U. S. C. 601, which was previously 22 U. S. C. 233, was identical with that originally enacted as

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[2] In the 1948 revision of the United States Code this section now appears as 18 U.S.C. 951.

Section 3 of Title VIII of the Act of June 15, 1917, and, therefore, is one of the enumerated offenses for which an alien is rendered subject to deportation under the Act of May 10, 1920 upon a finding that he is an undesirable resident. Clearly, the 1940 act did not repeal but merely increased the penalty prescribed in the 1917 statute. With the identity of the several sections thus established, it is beyond doubt that the crime of which petitioner was convicted, namely a conspiracy under 18 U. S. C. 88 to violate the provisions of 22 U. S. C. 233,[3] was one of those specified in the 1920 deportation statute.

Petitioner's argument (Br. 9-12) that the Act of March 28, 1940, materially changed Section 3 of Title VIII of the Act of June 15, 1917, is completely without merit. The title of the 1940 act expressly states that its purpose was merely "to amend" the 1917 act so as to increase the penalties for peacetime violations; the definition of the offense was untouched. The legislative history (see S. Rep. 598, 76th Cong., 1st sess.; H. Rep. 1716, 76th Cong., 3d sess.) puts it beyond doubt that Congress did not intend to create a new offense

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[3] Neither the indictment nor the judgment of conviction appear in the record. The return to the writ of habeas corpus, to which no traverse was made, states (R. 7) that petitioner was convicted "on September 3, 1941 of having conspired to act as an agent for a foreign Government without being registered, and as such agent, to accumulate information for transmittal to a foreign Government (18 U.S.C. 88; 22 U.S.C. 233)." Although the substantive offense should have been cited as 22 U.S.C. 601, the error did not mislead petitioner to his prejudice, and, therefore, was immaterial. See Rule 7(c), F. R. Crim. P.

or to alter the 1917 statute in any respect except to give greater discretion to the courts in imposing punishment.

It is inconceivable that when Congress decided in 1940 that the offense warranted greater penalties than were originally prescribed, the offenders were to be considered less undesirable aliens. And yet, in essence, that is the very argument petitioner advances (Br. 10). Its unsoundness is demonstrated by the fact that on March 27, 1940, one day prior to the authorization of increased penalties for violations of the Act of June 15, 1917, Congress passed and sent to the President a bill (H.R. 6724, 76th Cong., 3d sess.) to expedite the deportation of aliens convicted under that act of espionage and sabotage by providing for their automatic expulsion, thereby obviating the need for an administrative finding that they were undesirable residents. See H. Rep. 829, S. Rep. 918, 76th Cong., 1st sess. This action is incompatible with the inference, urged by petitioner, that Congress considered the remedy of deportation inapplicable because of the availability of increased criminal punishment. The bill was vetoed by President Roosevelt because it included a provision for the mandatory deportation of habitual users of narcotic drugs. He explained, however, that "* * * Ample authority is found in the existing law for the deportation of aliens guilty of such activities [espionage, sabotage, etc.] for the Secretary of Labor is already authorized to deport them if,

after hearing, it is found that they are undesirable residents of the United States (U.S.C., title 8, sec. 157). Further legislation on this subject appears to be unnecessary and superfluous." Message from the President, H. Doc. No. 689, 76th Cong., 3d sess.

There is no significance in the circumstance, upon which petitioner relies (Br. 13-15), that in respect of the deportable offenses enumerated in subparagraphs 2(e) and 2(g) of the Act of May 10, 1920, Congress used all-inclusive terminology, e.g., "any amendment thereof or supplement thereto", whereas it specified only one amendment in subparagraph 2(a), which sets forth the offense involved here. The reason for the difference in treatment is obvious. Subparagraphs 2(e) and 2(g) deal with statutes of a broad and comprehensive nature involving subject matters of extreme fluidity during wartime, and amendments were necessarily frequent. It would have been cumbersome draftsmanship to have referred to all the changes up to the time of the enactment of the Act of May 10, 1920. On the other hand, there was only one amendment of the statute described in subparagraph 2(a) and it was convenient, therefore, to specify that particular amendment.

Far from being the comfort to petitioner which he asserts (Br. 7), the decision in *United States* v. *Heine*, 151 F. 2d 813 (C. A. 2), certiorari denied, 328 U. S. 833, involving a co-defendant in the count of the indictment to which petitioner pleaded guilty,

undermines his contention that the charge against him was improperly designated a conspiracy to violate 22 U. S. C. 233. For Heine's conviction on that very charge was affirmed.

B. *The fact that petitioner was ostensibly a naturalized citizen at the time of his conviction is immaterial.*—For our answers to petitioner's contention that the Act of May 10, 1920, does not apply to him since he was a naturalized citizen at the time of his conviction in 1941, we respectfully refer the Court to our brief in the *Willumeit* case (No. 82, this Term).

C. *Petitioner was found to be an "undesirable resident."*—As a condition precedent to the deportation of petitioner, the Attorney General must find that he is an "undesirable resident." Act of May 10, 1920, c. 174, 8 U. S. C. 157, *supra; Mahler v. Eby*, 264 U. S. 32. Petitioner contended below and in his petition for certiorari that no such finding was made in his case. His contention now is less specifically phrased (Br. 2, 8) and we shall deal with the point as originally made.

Although the warrant of deportation (R. 1-2) is less explicit than may be desirable in that it merely states "he has been found to be a member of the undesirable classes of alien residents enumerated in said Act to wit, an alien who since August 1, 1914 has been convicted of conspiracy," etc., there is, as the Court of Appeals noted (R. 14) "an explicit finding in the administrative proceedings that re-

lator 'is an undesirable resident'." [4] Thus the situation is clearly distinguishable from that in *Mahler* v. *Eby*, where the defect in the warrants was not met by other matter in the record.

The sufficiency of the evidence to support a finding that petitioner is an undesirable resident is not open to question. The quantum of evidence required to support a finding of undesirability in the case of alien enemies who were merely interned during the war and that required for the deportation of alien enemies who were convicted of wartime crimes, may be different, but it is clear at least that in the latter case, the alien's conviction alone is enough to justify a finding of undesirability as a resident. *Mahler* v. *Eby*, 264 U. S. 32. And since petitioner has been found an undesirable resident, and since he would not be entitled to any further hearing to present additional evidence, no useful purpose would be served in remanding merely for amendment of the warrant of deportation to state explicitly in that document the finding of undesirability. The only questions open on habeas corpus are whether (1) the Attorney General correctly construed the deportation statute; (2) procedural due process was satisfied; (3) the findings required by the statute were made, and (4) the order was based on some evidence. (See Douglas, J.,

[4] The administrative file, though not in the printed record, was used in the argument in the Court of Appeals and is now on file in this Court. It shows that the Board of Immigration Appeals found as a fact (see page 5 of its Opinion): "That the respondent is an undesirable resident of the United States."

dissenting in *Ludecke* v. *Watkins*, 335 U. S. 160, 184-185, 187, and cases therein cited.) Petitioner has failed to sustain his position on any of these points, and his detention, therefore, should not be disturbed.

D. *The judgment of denaturalization is not open to attack in these proceedings.*—It appears that petitioner has made a direct attack upon the denaturalization judgment in another proceeding and his appeal from an adverse decision is now pending in the Court of Appeals for the Second Circuit. For that reason alone, the collateral challenge here made should be disregarded. The petition for a writ of habeas corpus in this case (R. 3-5) did not challenge the validity of the decree and neither of the courts below in the present case passed upon the question. Furthermore, since the court which entered the judgment had jurisdiction to act, the validity of the judgment cannot be reviewed collaterally. *Knewel* v. *Egan*, 268 U. S. 442, 445; *United States ex rel. Knauer* v. *Jordan*, 158 F. 2d 337 (C. A. 7), certiorari denied, 331 U. S. 810.

Petitioner appeared and, with the aproval of his attorney, consented to the entry of a judgment of denaturalization. His argument that the court lacked jurisdiction to enter a judgment of denaturalization by consent is without merit. Cf. *United States* v. *Borchers*, 163 F. 2d 347, 349 (C. A. 2), certiorari denied, 332 U. S. 811. In *Klapprott* v. *United States*, 335 U. S. 601, the contention that citizenship cannot be lost by a default judgment

was rejected by a majority of this Court. *A fortiori,* when there is consent, freely and voluntarily given, to the entry of the judgment of denaturalization, such a judgment is within the jurisdiction of the court to enter. For such consent is surely an adequate substitute even for the evidence in support of the complaint which some members of this Court would require to be adduced in default cases. *Klapprott* v. *United States, supra.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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